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IN THE
SUPREME COURT OF THE UNITED STATES
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OCTOBER TERM, 1994

MANUFACTURAS INTERNACIONALES LTDA; ABUCHAIBE HNOS LTDA; COMERCIAL SAMORA LTDA; CREACIONES VIVIANA LTDA; COMERCIAL ESTRELLA LTDA; CONFECCIONES Y TEJIDOS NACIONALES LTDA; MANUFACTURERA DEL ATLANTICO LTDA; and INDUSTRIAS MARATHON LTDA,

Petitioners,

V.

MANUFACTURERS HANOVER TRUST BANK COMPANY; BANCO ATLANTICO; and THE BANK OF NEW YORK,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE INTERMEDIARY BANKS MAY BE HELD LIABLE UNDER 18 U.S.C. § 2520, BECAUSE THEY KNOWINGLY PROGRAMMED THEIR COMMUNICATION MODEMS, A "DEVICE," FOR A PERIOD OF OVER 45 DAYS, TO CONTEMPORANEOUSLY ACQUIRE AND THEN DID DISCLOSE TO THE UNITED STATES THE CONTENTS OF PETITIONERS' IN TRANSIT ELECTRONIC FUND TRANSFER COMMUNICATIONS, BASED ONLY ON THE UNITED STATES' VERBAL ORDERS ISSUED IN NONCOMPLIANCE WITH 18 U.S.C. §. 2518(7), AND IN REM WARRANTS ISSUED IN NONCOMPLIANCE WITH 18 U.S.C. §. 2516(3)?

II. WHETHER THE INTERMEDIARY BANKS MAY BE HELD LIABLE UNDER 18 U.S.C. §. 2707, DUE TO THEIR DISCLOSING TO THE UNITED STATES THE CONTENTS OF PETITIONERS' IN TRANSIT ELECTRONIC FUND TRANSFER COMMUNICATIONS PLACED IN COMPUTER STORAGE IN VIOLATION OF 18 U.S.C. §. 2703(a)?

LIST OF PARTIES

In accordance Rule 12 of the Rules of the Supreme Court of the United States, this petition seeks review on a writ of certiorari to the United States Court of Appeals for the Second Circuit of a final decision in Manufacturas International Ltda. vs. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F. Supp. 180 (E.D.N.Y. 1992) (Weinstein, J.) Ct. App. No. 92-7360 (decided January 30, 1995).

The Petitioners that have appeared in this case include those listed on the case caption, and they neither have any parent companies nor any subsidiary companies.

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IN THE
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OCTOBER TERM, 1994

Manufacturas Internacionales Ltda; Abuchaibe Hnos Ltda; Comercial Samora Ltda; Creaciones Viviana Ltda; Comercial Estrella Ltda; Confecciones y Tejidos Nacionales Ltda; Manufacturera del Atlantico Ltda; and Industrias Marathon Ltda,

Petitioners,

v.

Manufacturers Hanover Trust Bank Company; Banco Atlantico; and The Bank of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York, dated February 27, 1992, in

Manufacturas International Ltda. vs. Manufactures Hanover Trust Co., and Consolidated Cases, 792 F. Supp. 180 (E.D.N.Y. 1992) (Weinstein, J.) (hereinafter "Consolidated Bank Cases), is reproduced at App. 1a.[1]

The opinion of the United States Court of Appeals for the Second Circuit dated January 30, 1995, Ct. App. No. 92-7360, is not yet reported, and is reproduced at App. 1b.

The Petitioners were claimants in the in rem forfeiture action United States v. All Funds on Deposit in any Account Maintained at Merrill, Lynch, Pierce, Fenner & Smith, 801 F. Supp 984 (E.D.N.Y. 1992) (Weinstein, J.)(herein

[1] "App. " references are to the section and page number in the Appendix.

after "All Funds Case"), reproduced at App. 1c; and were appellants in the subsequent appeal, United States v. Daccarett, 6 F.3rd 37 (2nd Cir. 1993), cert. denied, 114 S.Ct. 1294 (1994) (hereinafter "Daccarett"), reproduced at App. 1d.

Finally, although the Petitioners were not parties in Organizacion JD Ltd a., and Manufacturas JD Ltda. v. United States of America, Drug Enforcement Administration, Banco Atlantico, and the Bank of New York, 18 F.3d 91 (2nd Cir.) cert. denied 1994 WL 195065, 62 USLW 3824 (1994)(hereinafter "Organizacion JD"), because the action is related and on remand, for the convenience of the Court the trial court's order is reproduced at App. 1e, and the court of appeals decision is reproduced at 1f.

A. STATEMENT OF JURISDICTION

The Second Circuit issued its opinion on January 30, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED

THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986

18 U.S.C. § 2511:

(1) Except as otherwise specifically provided in this chapter any person who-

(a) intentionally intercepts,. . . , any . . . electronic communication;

(c) intentionally discloses, . . . to any person the contents of any . . . electronic communication, knowing or having reason to know that the information was obtained through interception of . . . electronic communication in violation of this subsection . . . shall be subject to suit as provided in subsection (5).

(2)(a)(i) . . . a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(3)(a) Except as provided in paragraph (b) of this subsection, a person

or entity providing an electronic commu nication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

18 U.S.C. § 2520:

(a) **In general.**-Except as provided in section 2511(2)(a)(ii), any person whose . . . electronic communication is intercepted, disclosed, . . . in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief may be appropriate.

(b) **Relief.**-In a civil action under this section, appropriate relief includes-

(2) damages under subsection (c) and punitive damages in appropriate cases; and,

(3) a reasonable attorney's fee and other litigation costs reasonable incurred.

(d) **Defense.**-A good faith reliance on-

(1) a court warrant or order . . .

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title;. . . .

is a complete defense against any civil or criminal action brought under this chapter or any other law.

18 U.S.C. § 2702. **Disclosure of contents:** (a) **Prohibitions.-** Except as provided in subsection (b)-

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service;. . .

18 U.S.C. § 2707. (a) **Cause of action** Except as provided in section 2703(e), any . . . customer aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) **Relief.**-In a civil action under this section, appropriate relief includes-

(2) damages under subsection (c); and,

(3) a reasonable attorney's fee and other litigation costs reasonable incurred.

(d) **Defense.**-A good faith reliance on-

(1) a court warrant or order . . .

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; . . . .
is a complete defense to any civil or criminal action brought under this chap ter or any other law

STATEMENT OF THE CASE

1. At the District Court

Manufacturers Hanover Trust Company, Banco Atlantico and the Bank of New York (hereinafter the "Intermediary Banks"), are subscribers to the three major world-wide electronic communication fund transfer services to the public (FEDWIRE, SWIFT, and CHIPS), and in this capacity as electronic communication service providers, the Intermediary Banks, handle daily billion of dollars of electronic fund transfers.

In their capacity as part of said electronic communication service, the Intermediary Banks received on July 17, 1990, verbal instructions from agents of

the United States government to program their respective communication modems to contemporaneously acquire and then disclose to the United States the contents of every third party electronic funds transfer communications in transit to - the Republic of Colombia.

Based only on these verbal orders, for over 45 days, the Intermediary Banks did knowingly acquire said in transit communication, placed the information in computer storage, and then disclosed the electronic fund transfer information to the United States.

As explained by the representative of Banco Atlantico,

> . . . <u>We got instructions to fax them over every transaction that we got for third-party beneficiaries in Colombia</u> . . . . What we would do is fax a copy of the transaction to Mr. Hui and then he would, same day or the next day the latest, tell us over the phone, "Okey, you

> are supposed to freeze this transaction as well." And then usually the same day or the day after we would get the [amended warrant for arrest of article-in-rem]. (emphasis added).

Based on the above verbal orders, Banco Atlantico disclosed to United States: a. two electronic fund transfer communications intended for Abuchaibe Hnos. Ltda., dated (i) July 17, 1990, for $200,000.00 and (ii) July 18, 1990, for $54,070.00; b. one electronic fund transfer communication intended for Comercial Samora dated July 18, 1990, for $124,000.00; c. one electronic communication intended for Creaciones Viviana Ltda., dated July 19, 1990, for $125,025.00.

Also based only these verbal orders, Manufacturers Hanover Trust Company acquired and disclosed the contents of the in transit electronic

communication intended for Industrias Marathon Ltda., dated July 20, 1990, for $805,194.35

Solely based upon the information disclosed to the United States during the pervious 72 hours by the Intermediary Banks, a Drug Enforcement Administration administrative subpoena was issued on July 20, 1990, which prohibited notice to the intended beneficiaries of the intercepted electronic communications, and sought all fund transfer information in electronic storage for the previous 180 days for said intended beneficiaries.

On July 23, 1990, again based only on these verbal telephone instructions of the United States, the contents of the in transit electronic communication intended for Manufacturas Internacional

Ltda. for $599,970.00; and intended for Manufacturera del Atlantico Ltda. for $492,810.00, were acquired and disclosed to the United States by Manufacturers Hanover Trust Co.

Later on July 24, 1990, Banco Atlantico acquired and disclosed to the United States the contents of the in transit electronic communication in the amount of $301,500.00, intended for Comercial Estrella.

On July 26, 1990, Manufacturers Hanover Trust Co., acquired and disclosed the contents of an in transit electronic communication in the amount of $549,990.00, intended for Confecciones y Tejidos Nacionales Ltda.

It was not until three weeks after first issuing these verbal instructions to acquire and disclose all third party

fund transfer communications going to the Republic of Colombia, did the United States use the information obtained between the period of July 17, 1990 through August 8, 1990, to issue the Sixth Amended In Rem Complaint and Warrant, and execute them on Manufacturers Hanover Trust Co., and on Banco Atlantico on July 31, 1990; and the Seventh Amended In Rem Complaint executed on the Bank of New York; Banco Atlantico; and Manufacturers Hanover Trust Co. on August 8, 1990.

Thus the fact establishes that the Intermediary Banks, based only on verbal orders, acquired and disclosed to the United Stated in transit electronic communication well beyond the 48 hours permissible time period under 18 U.S.C. §. 2518(7).

Based on the above acts of the Intermediary Banks, the Consolidated Bank Cases (App 1a), were filed as nine separate actions on July 18, 1991.

These individual actions were consolidated and transferred to Judge Weinstein, who was presiding over the All Funds Case (App 1c). On February 27, 1992, after denying any discovery, Judge Weinstein granted the Intermediary Banks' F.R.C.P 12(b)(6) motion in the Consolidated Bank Case. Judge Weinstein held that based on the "relation back doctrine," the electronic communications disclosed belonged to the United States, thus the Intermediary Banks compliance with the in rem warrant issued under 21 U.S.C. § 881, was sufficient to support a "good faith reliance" defense (App. 25a thru 31a).

A timely appeal to the United States Court of Appeals for the Second Circuit was filed in March, 1992.

2. At the Court of Appeals

While still in the midst of a jury trial in the All Funds Case, on April 24, 1992, a Stipulation was entered to suspend the Consolidated Bank Case appeal, pending a final decision in the All Funds Case.

At the conclusion of the jury trial in the All Funds Case, the Petitioners' motion to reinstate the Consolidated Bank Case was denied.

On August 5, 1992, in the All Funds Case Judge Weinstein issued his final decision wherein based on his "relation back doctrine" holding in the Consolidated Bank Case, he dismissed all claims

of violation of the Electronic Communication Privacy Act of 1986 (App 46c).

Also on August 5, 1992, Organizacion JD (App. 1e) was filed against the Intermediary Banks by the prevailing parties in the All Funds Case. The case was assigned to Judge Weinstein.

In September, 1992, a motion to reinstate and consolidate the Consolidated Bank Case appeal with the All Funds Case appeal was again denied.

On December 2, 1992, Judge Weinstein dismissed Organizacion JD based on this "relation back doctrine" holding in the Consolidated Bank Case.

Although refusing all attempts to reinstate and timely consider the Consolidated Bank Case during the preceding 19 months the Second Circuit on September 10, 1993, issued its final

decision in Daccarett (App. 1d), which affirmed Judge Weinstein's holdings in the All Funds Case, that the provisions of the Electronic Communication Privacy Act was not applicable, based on the "relation back doctrine" holding in the Consolidated Bank Case (App 58d thru 64d).

On February 24, 1994, in Organizac ion J.D. (App. 1f), the Second Circuit declared "that no civil liability existed under 18 U.S.C. § 2520, because the contemporaneous seizures of the electronic communication did not constitute "interception" since no "device" was used by the United States, and that "exigent circumstances" existed (App. 6f). However it vacated and remanded to for further consideration the allegation of liability against the United States

and the Drug Enforcement Administration under 18 U.S.C. § 2703.

But the Second Circuit used the Consolidated Bank Case holding to affirm that the Intermediary Banks were not civilly liable under 18 U.S.C § 2707 because of their alleged good faith reliance on the in rem court warrants issued under 21 U.S.C § 881(b)(4) (App. 12f).

On January 26, 1995, after nearly three years of keeping this timely appeal suspended, the Second Circuit finally permitted oral argument in the Consolidated Bank Case, and issued its order on January 30, 1995 (App 1b).

In their order in the Consolidated Bank Cases, the Second Circuit, relied on its holding in Daccarett and Organizacion JD as "law of the case," so to

totally disregard the alleged violations of 18 U.S.C. § 2518(7), and § 2703(a).

REASONS FOR GRANTING THE WRIT

Because the holdings of the Second Circuit in the All Funds Case, Daccaretta, and the Consolidated Bank Case, are in conflict with the decision of the Fifth Circuit in Steve Jackson Games Inc. v. United States Service, 36 F.3rd 457 (October 31, 1994); 1994 U.S. App. Lexis 30322, and involve an important question of federal statutory interpretation of the term "device," the petition for writ of certiorari should be granted.

A. THE SECOND CIRCUIT ERRED BECAUSE IT DID NOT CONSIDER THE PROHIBITION AGAINST THE INTERMEDIARY BANKS CONTEMPORANEOUSLY ACQUIRING AND DISCLOSING ELECTRONIC COMMUNICATIONS TO THE UNITED STATES.

Only by disregarding the prohibition in 18 U.S.C. § 2511(2)(a)(i) and

(3)(a), were the Intermediary Banks able to acquire and disclose to the United States the contents of all third party electronic communications going to the Republic of Colombia during the 45 day period of July 17 through August 26, 1990.

The legislative history of 18 U.S.C. § 2511, states:

> The exception to the divulgence bar are relatively straightforward. . . . **If the provider purposefully sets out to monitor . . . , this exception would not apply.** (Emphasis added) Judiciary Committee, Senate Report No. 99-541, 99th Congress, 2nd Sess. (1986), at page. 3580.

In this action the Intermediary Banks did exactly what Congress specifically prohibited.

Based only on the verbal orders of the United States, the Intermediary Banks set out to monitor for over a 45

day period all third party electronic fund transfer communications going to the Republic of Colombia by programming "stop ques" in their respective electronic funds transfer communications computer modems.

A modem, is short for modulator/demodulator, which is the only type of electrical device used to permit communications between computers at different sites, or between a computer and remote terminal. It does so by converting binary digital computer data into analog signals which can pass over telephone lines. Rixon, Inc. v. Racal-Milgo, Inc., D.C. Del, 551 F.Supp. 163, at 165; See Vol 27, Words and Phrases, Permanent Edition, West Pub. 1989 Supp.

Without the Intermediary Banks modem, no information could be acquired

and disclosed. See footnote 6, Steve Jackson Games Inc. v. United States Service, 36 F.3rd 457 (October 31, 1994); 1994 U.S. App. Lexis 30322

Consequently, the Second Circuit holding that the United States did not use a "device" to acquire the contents of the Petitioners electronic communication does not address the issue of whether or not the Intermediary Banks used their modem as a device to contemporaneously acquire and disclose the in transit funds transfer communications.

The facts are admitted that but for the United States verbal instructions, procuring the Intermediary Banks to program the "stop cues" in their respective modems, and thereby monitor all third party electronic funds transfer

communications in transit going to the Republic of Colombia, the Petitioners' electronic funds transfer communications would have passed uninterrupted through the electronic communication service providers system to the Beneficiary Bank in the Republic of Colombia, and finally to the Beneficiary.

The Second Circuit went on to use the holding of the trial court in the Consolidated Bank Case, while it held the appeal in "suspension," to decide in Daccarett, that the provisions of 18 U.S.C. § 2510 et seq. did not apply "[b]ecause the government did not use any type of `device' to obtain the EFTs and information, no `interception' occurred" (App. 64d).

Thus the Second Circuit held that the verbal order of United States issued

pursuant to 21 U.S.C. § 881(b)(4), authorized the contemporaneous acquiring of the contents of in transit electronic communications without a warrant. Finally, the Second Circuit failed to consider at all the alleged violations of 18 U.S.C. § 2703(a).

The holdings of the Second Circuit, are in clear conflict with the recent holding of the Fifth Circuit in Steve Jackson Games Inc. v. United States Service, 36 F.3rd 457 (October 31, 1994); 1994 U.S. App. Lexis 30322, because the Second Circuit failed to provide the protection to electronic communications which Congress mandated by not addressing the admitted fact that the Intermediary Banks were involved in the contemporaneous acquisition of the electronic communications through the

use of their modems. See United States v. Turk, 526 F.2d 654 (5th Cir.), cert. denied, 429 U.S. 823, 97 S.Ct. 74, 50 :.Ed. 84 (1976).

Specifically the Second Circuit never considered the amendments Congress enacted to 18 U.S.C. § 2511(1)(a) and (c), which specifically bar the United States from procuring any other person or entity, including the Intermediary Banks, from acquiring and disclosing the contents of electronic communication without judicial authorization obtained under 18 U.S.C.§ 2518, not just the self executing warrant issued under the Supplemental Rules of the Federal Rules of Civil Procedure.

Also the Second Circuit never considered 18 U.S.C. § 2511(2)(a)(i), prohibition against the Intermediary Banks

programming "stop ques" in their observ ing or random monitoring devices, to obtain access to electronic communications in transmission.

The Second Circuit never considered 18 U.S.C. § 2511(3)(a), prohibition against the Intermediary Banks intentional disclosing the contents of an electronic communication while in transmission on the service, except to the addressee or intended recipient upon proper judicial authorization under 18 U.S.C. § 2518.

Furthermore, under 18 U.S.C. § 2518(7), the Intermediary Banks were only permitted to provide the United States access to in transit electronic communication when an alleged emergency situation or "exigent circumstances" existed, if, and only if, within 48

hours of acquiring the contents of the electronic communication, an application was made by the United States and approved under the Federal Rules of Crimi nal Procedures.

Thus when an alleged emergency situation or "exigent circumstances" exists that involve the procuring of access to content of information in electronic communication, it is the newly enacted standard under 18 U.S.C. § 2518(7), which must be complied with, not the general lesser standard under the Fourth or Fifth Amendments. See §19.5, at p. 373, The Law of Electronic Commerce, Benjamin Wright, Little, Brown and Co. (1991).

Based on the above omissions it is respectfully argued that the previous

decisions of the Second Circuit are not controlling precedents since they totally failed to address the requirement of 18 U.S.C. §§ 2511(1)(a) and (c) and (3)(a), 2518(7) and 2703(a).

B. BECAUSE THE "RELATION BACK DOCTRINE" WAS USED TO DENY DISCOVERY, THIS ACTION SHOULD BE REMANDED TO PERMIT MEANINGFUL INQUIRY INTO THE INTERMEDIARY BANKS DEFENSE OF "GOOD FAITH RELIANCE."

As explained by the Fifth Circuit in Steve Jackson Games Inc. v. United States Service, 36 F.3rd 457 (5th Cir., October 31, 1994); 1994 U.S. App. Lexis 30322, Congress in enacting Electronic Communication Privacy Act of 1986, 18 U.S.C. §§ 2520 and 2707, authorized the maintaining of a civil action for damages by any person who was the intended recipient of an electronic communication in transit or in electronic storage, for which the contents were acquired and

disclosed without proper authorization. See Judiciary Committee, S. Rep. No. 99-541, 99th Congress, 2nd Sess. (1986); H.R. Rep. Mo. 99-647, 99th Congress, 2d Sess. (1986).

Under both 18 U.S.C. §§ 2520(d) and 2707(d), a showing of "good faith" reliance on an authorized court warrant or order issued under 18 U.S.C. §§ 2518 and 2703(a) and (e), is a complete defense to a civil action for damages.

However, under 18 U.S.C. § 2516(3), to be a valid court order, even an in rem warrant requested under the authority contained in 21 U.S.C. § 881(b)(4), must be issued in accordance with the requirements of Congress mandated in 18 U.S.C. § 2518(7), either before the acquiring of the electronic communication or within 48 hrs thereafter.

More importantly under 18 U.S.C. § 2703(a), the only authorized court warrant or order which would permit and make not actionable the Intermediary Banks acquiring access to and disclosing of electronic communications which were in transit and in electronic storage for less than 180 days, is one issued in accordance with the provisions of the Federal Rules of Criminal Procedure.

However, since Judge Weinstein denied all discovery and granted summary judgement based on the "relation back doctrine," the trial court never considered whether the Intermediary Banks in fact complied with the specific "good faith reliance" provisions of the Electronic Communication Privacy Act of 1986.

Although this use of the "relation back doctrine" by Judge Weinstein was subsequently overruled by the Second Circuit in Daccarett, based on the decision of the Supreme Court in United States vs. A Parcel of Land, Building, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey, Et. Al., 113 S.Ct. 1126 (1993), the Second Circuit still affirmed the lower court's holding.

Thus the Intermediary Banks never were required to demonstrate that in fact they relied in "good faith" on a facially valid court order required under 18 U.S.C. §§ 2518(7) and 2703(a), prior to acquiring access to and disclosing the Petitioners' electronic communications.

Although this is a factual questions, all discovery was denied by the trial court based on the "relation back doctrine." Thus in accordance with the Petitioners' right under 18 U.S.C. §§ 2520(d)(1) and 2707(d)(1), this action must be remanded to permit discovery and the requested jury trial on the fact that each of the electronic communications acquired and disclosed by the Intermediary Bank was based on the verbal order of United States under 21 U.S.C. § 881(b)(4), and subsequently executed in rem subpoenas.

C. THE INTENDED BENEFICIARIES OF THE ELECTRONIC COMMUNICATIONS ARE THE CLASS CONGRESS SOUGHT TO PROTECT FROM UNAUTHORIZED DISCLOSURE.

The Petitioners were the intended recipients of all the electronic communications which the Intermediary

Banks acquired access to, and disclosed to the United States.

The Intermediary Banks, as part of the FEDWIRE communication service, agreed to comply with the instructions contained in the electronic communication transmitted on said service. Thus the Intermediary Banks were neither the intended recipient nor a party to the acquired electronic communications, but were part of the electronic communication service provider system. See 18 U.S.C. § 2511(3)(a).

Under 18 U.S.C. §. 2510(12), an "aggrieved person" is defined as "a person who was a party to any intercepted wire. . . electronic communication or a person against whom the intercept was directed;...." (emphasis added).

Furthermore, 18 U.S.C. § 2707(a), permits recovery on the part of a "customer" of the service.

This statutory construction, which permits the intended recipient of an electronic communication to be the party in interest, is consistent with court decisions which have found that the receiving banks cannot deviate from the instruction contained in electronic communications.

In Evra Corp v. Swiss Bank Corp. 673 F.2d 951 (7th Cir. 1982), although the Court of Appeals held that under the holding of Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. (1854), a suit for consequential damages against a bank which fails to make a requested transfer of funds would not be maintained, the

Court held in dicta that a bank would be liable for direct damages Id. p. 955.

Furthermore, in Southern Electric Supply Co. v. Raleigh County National Bank, 320 S.E.2d 515 (W.Va. 1984), the court held that the beneficiary of a wire transfer would have a cause of action against a beneficiary bank for deviation from the instructions without the beneficiaries' consent or proper authority. The Court stated,

> [w]e would be hardpressed to think of a situation in which we could condone a bank's decision to ignore the instructions of a [sender] and unilaterally decide to alter [an electronic fund transfer]. To get a third party's funds, a bank would need explicit authority from the third party.... Whether the unauthorized person is a stranger, family, or bank officer, the withdrawal is wrongful. When a wire transfer comes to a bank, it is obligated by the transmission to credit the designated account. Id. 320 S.E.2d at 519.

The intended recipient's right of action is also recognized in Regulation J of the Federal Reserve System, 12 C.F.R. §210, (January 1, 1990 Edition), issued by the Board of Governors of the Federal Reserve System, because the regulation places a duty on the Intermediary Bank to follow the instructions contained in the wire transfer. 12 C.F.R. §210.26 Definitions, states:

> "Transferee" means a member bank, or other institution that (1) main tains or, if authorized by the Reserve Bank, uses an account at a Reserve Bank and (2) is designated in a transfer item or request to receive the amount of the item or request.

12 C.F.R. §210.30(b) Transferee's agreement, states:

> A transferee...that receives a transfer item, or advice of credit of a transfer item, designating a beneficiary agrees:
> (1) To credit promptly the beneficiary's account or otherwise make

> the amount available to the beneficiary: or
> (2) To notify promptly its reserve Bank if it is unable to do so because of circumstances beyond its control. (Emphasis added)

The above court decisions and regulations which provide a right of action by the intended beneficiary of an electronic communication was unified by the Commissioners on Uniform State Laws and the American Law Institute in U.C.C. Article 4A.

U.C.C. 4A, is aimed at providing a comprehensive body of law governing electronic fund transfer communications. See D. Baker & R. Brandel, The Law of Electronic Fund Transfer Systems, ¶1.0-1(2d ed. 1988), and to this end on January 12, 1991, the State of New York enacted the State of New York Uniform Commercial Code-U.C.C. §4-A.

Although the U.C.C. 4A was enacted in New York State six months after the Intermediary Banks action, it is useful for purposes of analysis of the intended beneficiaries rights.

Under U.C.C. § 4A-302, the receiving bank, whether it be the "intermediary bank" or the "beneficiary bank" is obligated to both the sender and the intended beneficiary to follow all instructions of the sender. Also under U.C.C. §4A-405, with the completion of each payment order, a bank becomes obligated to pay funds to the next link in the chain, culminating with the duty of the beneficiary's bank to pay the beneficiary.

Thus when the electronic funds transfers were received by the Intermediary Banks they were obligated to not

deviate from the instructions, and to immediately transmit the electronic funds transfers communication to the Petitioners, as the intended recipient and customer of the electronic communication service. The Intermediary Banks failure to comply with the instructions, permits a cause of action under both 18 U.S.C. § 2510 et seq.

CONCLUSION

In summary, the contents of every third party electronic communication going to the Republic of Colombia was disclosed to the United States based only on verbal orders or self executing in rem warrants issued under the Supplemental Rules of the Federal Rules of Civil Procedure.

The Intermediary Banks programmed a device, their modems, to acquire these electronic fund transfer communications for a period of over a 45 days based on verbal orders from the United States. Thus the Petitioners have a cause of action against the Intermediary Banks under 18 U.S.C. §§ 2516(3), 2518(7) and 2703(a), within 48 hrs. of the contemporaneous acquisition and disclosing of

Petitioners' in transit electronic fund transfer.

Respectfully submitted,

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